IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1970

70-145

THOMAS L. WOOLDRIDGE — Petitioner

versus

COMMONWEALTH OF KENTUCKY — Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE KENTUCKY COURT OF APPEALS

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COMMONWEALTH OF KENTUCKY - *Respondent*

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May it please the Court:

Petitioner prays that a Writ of Certiorari be issued to the Kentucky Court of Appeals.

OPINIONS BELOW

The Petitioner was tried by jury, convicted and sentenced in the Lincoln County Circuit Court at Stanford, Kentucky, by indictment charging him with violation of Kentucky Revised Statutes 433.120, the same relating to the illegal possession of burglary tools, and with violation of Kentucky Revised Statutes 433.240, the same relating to damaging private property. The opinion sustaining the conviction upon appeal to the

Kentucky Court of Appeals is cited as 459 S. W. 2d 404 (Ky.). The said opinion is attached to this Petition as Appendix A.*

JURISDICTION

The Judgment of the Kentucky Court of Appeals was entered on June 26, 1970. A timely petition for rehearing was denied on December 4, 1970. An order of this Court, dated March 5, 1971, was signed by Justice Stewart granting an extension of time within which to petition for certiorari to and including May 3, 1971.

The jurisdiction of this Court is invoked under Rule 19(a) of this Court and under the Sixth and Fourteenth Amendments to the Constitution of the United States.

QUESTIONS PRESENTED

A. Did the trial court err in rescinding its order for the procurement of a material witness to the defense of the Petitioner, over objection of the Petitioner, and refusing a continuance of the trial, upon motion of the Petitioner, because the Petitioner could not pay the expense of procuring said witness?

B. Where the regular jury panel was exhausted with eleven jurors qualified, and where the trial court disregarded lawful procedure in selecting an additional jury panel, over objection of the Petitioner, did the

*Reference herein to the Petitioner's Appendix attached to this Petition is designated as (App. A) and when made to the supplemental appendix is designated as (App. B).

trial court err in refusing to rectify the error upon the timely motion of the Petitioner?

C. Where the trial court permitted the admission into evidence, over the objection of the Petitioner, the entire contents of an automobile in the possession of the Petitioner, and permitted direct examination by the prosecution in regard to said contents, over objection of the Petitioner, did the trial court err in then refusing the Petitioner cross-examination in respect to said contents?

D. Where property allegedly damaged by the Petitioner was subsequently found intact and then dismantled with various parts being destroyed, did the trial court err in allowing demonstrations to be performed for the purpose of substantiating that tools similar to those found in the possession of the Petitioner might have been used for an unlawful purpose?

STATUTES INVOLVED

The statutes involved in this case are as follows:

A. Section 421.250 of the Kentucky Revised Statutes (App. B. —);

B. Section 433.240 of the Kentucky Revised Statutes (App. B. —);

C. Section 433.120 of the Kentucky Revised Statutes (App. B. —);

D. Section 29.280 of the Kentucky Revised Statutes (App. B —).

STATEMENT OF THE CASE

Petitioner and a co-defendant, Ira J. Haynes, were charged by indictment with the violation of Section 433.180 of the Kentucky Revised Statutes, the same relating to dwelling house breaking; Section 433.190 of the Kentucky Revised Statutes, the same relating to storehouse breaking; Section 433.240, the same relating to damaging private property; Section 433.120(2), the same relating to possession of burglary tools; Section 437.110(2), the same relating to conspiracy.

Both plead not guilty to the said charges. The Petitioner was tried by a jury in the absence of his co-defendant. The Petitioner was convicted of Section 433.240, the same relating to the damaging of private property and Section 433.120(2) of the Kentucky Revised Statutes, the same relating to the possession of burglary tools. He was sentenced to five years' imprisonment and a five hundred dollar fine. The remaining charges were dismissed by the trial court (App. B —).

At 3:00 o'clock one morning the owner of a motel observed appellant in a public telephone booth located on the motel premises. He appeared to be tampering with the phone box and was using a ratchet-like tool. When the motel owner made inquiry, appellant informed him that he was trying to call his wife. When he departed in an automobile the license number was taken and the police were called. Later that morning appellant was arrested, and later in the day his automobile was searched under a search warrant. Various

items were found in the automobile, including tools, keys, fishing equipment, and clothing, and all were confiscated by the police (App. A, pp. 9-12; App. B —).

Prior to the trial, the court was advised that Ira Haynes, the Petitioner's co-defendant, was incarcerated in the State of Indiana. Upon finding that the said Haynes was a material witness to the Petitioner's defense, the trial court entered an order to procure the attendance of Haynes at the time of trial (App. B —). Three days prior to the trial date, the court rescinded the order for the attendance of Haynes and overruled a motion by the Petitioner for a continuance (App. B —). On November 18, 1968, the Petitioner and his attorney filed affidavits setting forth the need for Haynes' presence, their inability to secure his presence, and a request for the continuance of the trial (App. B —. Upon a hearing on the said motion, the Petitioner reaffirmed that he was financially unable to meet the demand of the court that the Petitioner pay the expenses of securing the attendance of Haynes. The court overruled the Petitioner's motion for a continuance on the grounds that the Petitioner failed to pay the said expenses and immediately ordered commencement of the trial (App. B —).

During the selection of the jury, eleven jurors were accepted when the jury panel became exhausted. The court drew one person's name from the jury wheel and summoned him for duty. The Petitioner apprised the court that an error had been committed in the securing of additional jurors and moved to discharge the jury, and said motion was overruled (App. B —).

Subsequent to the Petitioner's arrest, the entire contents of an automobile in possession of the Petitioner was confiscated by the police and admitted into evidence by the trial court. The Petitioner objected to the admission of this property, both prior to the commencement of the trial and prior to the said admission (App. B —).

In addition to various other items, the trial court permitted direct examination and an outward display of a bag of coins obtained from the automobile, even though no coins or money were alleged to have been taken and none were taken (App. B —). However, the trial court would not permit the Petitioner to cross-examine on the admission of a bank book belonging to the Petitioner and indicating he was in the automobile wrecking business (App. B —).

Over the objection of the Petitioner (App. B —), the trial court permitted the admission into evidence a telephone which the prosecution contended was damaged by the Petitioner prior to his arrest. The telephone was displayed to the jury in a dismantled condition and with the lock drilled out and completely destroyed (App. B —). The trial court also permitted, over objection of the Petitioner, various demonstrations to the jury as to how certain tools found in the automobile might have caused the damage. Testimony by an agent of the company who owned the telephone subsequently testified that he had drilled the lock and dismantled the instrument. The agent further testified that subsequent to the Petitioner's arrest he found the telephone intact with something wrong with the lock

(App. B —). Further testimony revealed that the tools were incapable of causing the alleged damage (App. B —).

The Petitioner moved for verdict of acquittal on each of the objections enumerated above (App. B —). The Petitioner also stated each of the above objections as grounds for a new trial (App. B —).

REASONS FOR GRANTING WRIT

Certiorari is sought by the Petitioner on the grounds that his conviction in the trial court is in violation of the Sixth and Fourteenth Amendments to the Constitution of the United States and the affirmance thereof by the Kentucky Court of Appeals is in direct conflict and contrary to the decisions of this Court. This petition deals with a matter of great importance involving basic fundamental constitutional rights to a fair trial.

The trial court refused the Petitioner a continuance of his trial even though the court failed to secure the attendance of a material witness. The trial court based its refusal on the grounds that the Petitioner failed to provide the expenses in obtaining the witness. Section 421.250 of the Kentucky Revised Statutes clearly provides for the securing of such witnesses by the trial court and for the expenses to be paid by the State (App. B —). Denial of the continuance and the failure of the court to secure the only material witness available to the Petitioner is clearly contrary to *Barber* v. *Page*, 390 U. S. 719.

Notwithstanding the opportunity of the trial court to rectify the error in selecting the additional jury panel, it refused to do so, and placed the Petitioner in the position of accepting the single member or speculate on someone yet unknown. This deviation of settled procedure, set forth by Section 29.280 of the Kentucky Revised Statutes (App. B —) are definitely repugnant to the principles of this Court. *Fahy* v. *Connecticut,* 375 U. S. 85; *Estes* v. *Texas,* 381 U. S. 532.

The trial court's denial of allowing the Petitioner to cross-examine regarding evidence presented by the prosecution is equally as repugnant as allowing the admission and display of altered evidence with no degree of control by the trial court.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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